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NOTES.

HIGHWAY EASEMENTS—ELEVATION OF RAILROAD TRACKS. That the performance of acts of a public character, with proper care, and in compliance with the provisions of statutes, gives rise to no cause of action in favor of the owners of adjoining land injured thereby, if there be no actual encroachment upon property, is a doctrine which has met with general acceptance, though the hardships involved in its application have led in some States to the adoption of constitutional amendments, and in others to the enactment of statutes, providing for compensation for the consequential losses suffered in such cases.

Within the principle it is held in New York that the damage to abutting property, caused by a duly authorized change in the grade of a highway, is merely consequential, and does not amount to a taking of property within the constitutional prohibition. Hence, where no express statutory povision is made for compensation, there can be no recovery. *Radcliff's Executors* v. *Mayor of Brooklyn* (1850) 4 N. Y. 195. The New York decisions on change of grade proceed "on the ground that individual interests in streets are subordinate to public interests." *Per* ANDREWS, C. J., in *Reining* v. *Railroad* (1891) 128 N. Y. 157, 165. Yet, notwithstanding the doctrine of these decisions, it was held in the leading case of *Story* v. *N. Y. Elev. R. R.* (1882) 90 N. Y. 122, that an owner of land might recover for the depreciation in the value of his property caused by the erection, under authority conferred by statute, of an elevated railroad structure in the street on which his premises abutted; and this result was said to be independent of the ownership of the highway. The court granted relief on the ground that the maintenance of the viaduct by the company amounted to a taking of the plaintiff's property, in that it interfered with certain prop-

erty rights which he had in the street as appurtenant to his land; namely, easements of light, air, and access reserved or granted, as the case might be, by implication. This doctrine has been much criticized as anomalous and unsound and has been the source of a great flood of litigation. The better view seems to be that contended for by FINCH, J., in his dissenting opinion: "Light and air are mere incidents and accidents of a street. . . If there be any such thing in a street as an easement for light and air, it is subordinate to all the uses and burdens to which a street may be subjected by the paramount authority of the legislature." Although the principle of the *Story* case is obviously inconsistent with that governing in *Radcliff's Executors* v. *Mayor, etc., supra*, both decisions are still of binding authority in New York.

In its treatment of the recent case of *Fries* v. *New York & Harlem R. R.* (1901) 169 N. Y. 270, the Court of Appeals (CULLEN, BARTLETT and VANN, JJ., dissenting), seems to have brought additional confusion into the law—influenced, it may be, by a desire to return, even at the expense of further inconsistency, to those principles of the common law which have been ignored in the elevated railroad cases. In the *Fries* case it appeared that the company had for many years maintained its tracks in an open cut in the street on which the plaintiff's lot fronted, and had acquired the right without liability to the plaintiff to occupy the cut. The fee of the highway was in the city of New York. An elevated railroad structure having been erected in the street by public commissioners, acting in compliance with certain mandatory statutes providing for the improvement of the highway, the company in 1897 had removed its tracks to the viaduct, as the law required, and had since maintained them there. The plaintiff sued the company, demanding damages for interference with his easements of light and air for the period during which the defendant had been in possession of the viaduct, relying on the doctrine of the *Story* case, and on the late decision of *Lewis* v. *New York & Harlem R. R. Co.* (1900) 162 N. Y. 202, where, in a suit for damages for injury to property caused by the maintenance of the same structure, relief had been granted. But the court, overruling the *Lewis* case, denied recovery, holding that the doctrine of the elevated railroad cases was inapplicable. It is contended that, inasmuch as in the principal case the erection of the viaduct was compelled by the legislature, whereas, in the *Story* case, the language of the statute was permissive only, the two cases are to be reconciled. MARTIN, J., p. 284, 285. That argument might be valid were the legislature, like Parliament, supreme; as it is, the form in which a statute is enacted must be quite immaterial as regards one's right to compensation for property taken without due process of law. A plaintiff cannot be denied relief on the ground that the legislature *commanded* a defendant to interfere with his easements.

Another member of the court seeks to distinguish the cases on a different ground. He asserts that the elevated railroad cases "proceed upon the principle that, as against abutting owners, the railroad

was unlawfully in the street, as they had not consented to the construction, or conveyed the right to interfere with their easements." He remarks that in the principal case there was "an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad," and concludes that "hence, the principles upon which that mass of litigation proceeded have no application to this case." O'BRIEN, J., p. 278. But this position seems quite as untenable as the other, for, in the *Story* case, the ruling that, "as against abutting owners, the railroad was unlawfully in the street," was based wholly on the doctrine that the maintenance of the viaduct amounted to a taking of the plaintiff's property (*i. e.* his highway easements), not on the fact that he had not consented to its erection in the street. Indeed, it is well settled that no compensation need be made abutting owners for the consequential injury caused by the construction of railroads in highways owned by the public (as they are owned in New York City). *Forbes* v. *Railroad* (1890) 121 N. Y. 505. Their consent would seem to be unnecessary. By the mere acquisition of the right, as against Fries, to operate its road in the cut, the Harlem Company did not acquire the right to cut off his light and air sixty years later; those easements were not interfered with until the erection of the viaduct.

It will hardly be seriously contended that the elevation of the tracks amounted to a change in the grade of the highway, and thus came within the principle of *Radcliff's Executors* v. *Mayor, etc., supra.* The law, then, is left in a curious condition: under the holdings of the court, (1) a surface road may be laid in the streets of New York without liability to the abutting owners; (2) if an elevated railroad be constructed, it is necessary to compensate property owners for the consequent interference with their highway easements; (3) the tracks of a surface road may be transferred to an elevated structure without making any compensation. The logical result seems to be that it is possible to escape the heavy liability incident to the construction of elevated railroads by first acquiring the right to lay tracks on the surface of the streets.

CONFLICT OF LAWS IN CONTRACTS OF CARRIAGE.—Several years ago the Supreme Court decided that stipulations in a bill of lading exempting the carrier from liability for negligence were void, although they were valid both by the law of New York where the contract was made and by the law of England where performance was to be completed, with reference to which it was contended that the parties had contracted. *Liverpool Steam Co.* v. *Phenix Ins. Co.* (1888) 129 U. S. 397. As to what the result would have been, had the parties expressly stipulated that the English law should control, the court declined to express an opinion. Since that time although several cases involving this question have been decided by the inferior Federal courts, only one case bearing upon the point has come before the Supreme Court. *Knott* v. *Botany Mills* (1900)